

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALFREDO GOMEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,062
<b>THERMAL EQUIPMENT CORPORATION</b>	)	
Respondent	)	
AND	)	
	)	
<b>AMERICAN HOME ASSURANCE COMPANY and</b>	)	
<b>SAFECO INSURANCE COMPANY OF ILLINOIS</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and Safeco Insurance Company of Illinois (Safeco), one of respondent's insurance carriers, appeal from an Order dated September 23, 1998, which granted claimant's request for preliminary benefits. The Order, entered by Administrative Law Judge Nelsonna Potts Barnes, also ordered respondent and Safeco to pay those preliminary benefits.

**ISSUES**

In their application for review to the Appeals Board, respondent and Safeco stated "there is a disputed jurisdictional issue(s) as to whether and when claimant suffered an accidental injury and whether or when it arose out of and in the course of the claimant's employment, and also whether certain other defenses apply." In their brief, respondent and Safeco state the issues as:

- A. For jurisdictional purposes, what is the date of accident and injury for purposes of compensation owed to claimant on this claim?
- B. The respondent and which of the two involved insurance carriers are liable for compensation payable to claimant based upon the claimant's date of accident and injury?

But, respondent and Safeco's brief also states:

Respondent and Safeco Insurance company admit claimant is entitled to medical benefits and all other benefits resulting from his accidental injury arising out of and in the course of his employment with respondent. At issue is which insurance carrier is liable for these benefits to claimant based upon a determination of the accidental injury date.

Thus, although respondent and Safeco attempt to describe the issue as one of compensability, it is clear from the briefs that the issue is really the date(s) of accident for the sole purpose of determining which of respondent's insurance carriers should initially pay for the preliminary benefits ordered. This is also what counsel represented to the Court at the preliminary hearing:

THE COURT: And, Mr. Martens, what are your respondent and insurance carrier's objection to the claimant's request?

MR. MARTENS: Your Honor, we believe that the date of accident is outside of our coverage period.

THE COURT: And, Mr. Brewer, what are your objections?

MR. BREWER: Judge, basically it's the position of the subsequent carrier that there was only one date of accident and injury in this case, that being on December 20th of 1997, which was in the coverage period of Mr. Martens' carrier.

Respondent and American Home Assurance Company (American) raise an issue concerning the Appeals Board's jurisdiction to decide this issue on an appeal from a preliminary hearing Order.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes that the Administrative Law Judge did not exceed her jurisdiction in granting the relief requested at the preliminary hearing.

There is no dispute concerning the compensability of claimant's injury. The Administrative Law Judge ordered Safeco to pay because "the evidence presented indicates that Claimant's condition intensified and became worse as he continued to work each and every day thereafter."

As counsel for respondent and American points out in their brief, K.S.A. 1997 Supp. 44-551(b)(2)(A) limits the jurisdiction of the Appeals Board to review preliminary hearing orders only in cases where one of the parties has alleged the Administrative Law Judge

exceeded his or her jurisdiction. This jurisdiction includes the specific issues identified in K.S.A. 1997 Supp. 44-534a. A contention that the Administrative Law Judge has erred in her finding that the evidence shows a continuing series of repetitive injuries or mini-traumas as opposed to a single accident is not an argument the Appeals Board has the jurisdiction to consider on an appeal from an order entered pursuant to K.S.A. 1997 Supp. 44-534a.

The arguments pertain to what date of accident should control for purposes of determining which insurance carrier is liable. This does not give rise to a disputed issue of whether claimant's injury occurred as a result of an accident which arose out of and in the course of claimant's employment with respondent. Whether claimant's date of accident is found to be before or after January 1, 1998, does not alter the fact that the injury is the result of claimant's employment with respondent. That fact appears to be undisputed.

The Appeals Board likewise finds it does not have jurisdiction of this appeal from a preliminary hearing order because respondent and Safeco's arguments also fail to raise a jurisdictional defense. The Appeals Board has previously held that the certain types of defenses contemplated by K.S.A. 44-534a(a)(2), are defenses which go to the compensability of the claim. See, Cockerham v. Nichols Fluid Service, Docket No. 201,867 (Feb. 1996). As indicated above, the issues raised by this appeal do not fall within that category. Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961).

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review at this juncture of the proceedings the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes, dated September 23, 1998, and that this appeal should be, and the same is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1998.

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BOARD MEMBER

c: Thomas T. Inkelaar, Wichita, KS  
Jeffery R. Brewer, Wichita, KS  
Kim R. Martens, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director